

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 24, 2006

STATE OF TENNESSEE v. JOE MICHAEL SHELTON

Appeal from the Circuit Court for Giles County
Nos. 11094 & 11107 Robert L. Holloway, Judge

No. M2005-01132-CCA-R3-CD - Filed March 30, 2006

The defendant, Joe Michael Shelton, appeals the Giles County Circuit Court's order revoking his probation and denying his motion for a reduced sentence. On appeal, the defendant claims (1) that the trial court abused its discretion in revoking his probation and ordering him to serve his sentence in confinement, (2) that the trial court erred in not considering alternative sentencing, and (3) that he was denied his right to due process because the trial court did not rule on his motion to rehear addressing prosecutorial bias. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

J. Daniel Freemon, Lawrenceburg, Tennessee, for the appellant, Joe Michael Shelton.

Paul G. Summers, Attorney General and Reporter; Jane L. Beebe, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Beverly White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's convictions for aggravated assault, aggravated burglary, reckless endangerment with a deadly weapon, and domestic assault against the defendant's ex-wife and former mother-in-law. The Giles County Grand Jury indicted the defendant on one count of domestic assault, a Class A misdemeanor. The charges of aggravated assault, a Class C felony, aggravated burglary, a Class C felony, and reckless endangerment with a deadly weapon, a Class E felony, were brought against the defendant by information. On July 16, 2003, the defendant entered guilty pleas to all four counts. The defendant received a six-year sentence for the aggravated assault, a six-year sentence for the aggravated burglary, a two-year sentence for the reckless endangerment with a deadly weapon, and an eleven-month and twenty-nine day sentence for the domestic assault to be served concurrently as a Range I, standard offender. The trial court placed the defendant on supervised probation for six years. On January 30, 2004, a probation violation warrant was filed

alleging the defendant violated the terms of his probation by failing to report as instructed since October 15, 2003, failing to pay probation fees, and failing to pay court costs. On May 17, 2004, an amended probation violation warrant was filed alleging the defendant also violated the terms of his probation by entering an establishment that sold alcohol.

At the probation revocation hearing, Linda Lipham testified that she was the defendant's probation officer. She said the defendant missed reporting from November 2003 to February 2004 but after the probation violation warrant was served, he did not miss any more reporting dates. She said the defendant had reported every month from April 2004 to September 2004. She said she did not know if the defendant had contacted her during the time he was not reporting because she did not have her contact notes with her when she was testifying. She said that she received a letter from the defendant's ex-wife informing her the defendant was a patient in treatment at Parthenon Pavilion at Centennial Medical Center and that she verified the defendant was there. She said the defendant failed to pay probation fees since November 2003 but may have paid some of the missed fees by the time of the hearing. She said the defendant had only paid \$100 of the over \$1000 he owed for court costs. She said she filed an amended probation violation warrant after a Minor Hill police officer saw the defendant "frequenting Sarah's Place¹," a bar in Minor Hill.

On cross-examination, Ms. Lipham acknowledged the defendant paid his probation fees every time he reported to her and paid sixty dollars when he reported in March. She acknowledged the defendant "probably caught up [on probation fees] within \$15 to \$30." She said that the defendant should have reported to her on the second Tuesday or Wednesday of each month but that if the defendant missed both days he should have called and made another appointment. She said she did not give the defendant a schedule for paying his court costs and had told him to pay as much as he could pay each month. She acknowledged that she did not know if the defendant paid the amount he was able to pay each month and that the defendant had the entire probationary period to pay off the costs.

Minor Hill Chief of Police Jason Sexton testified that he saw the defendant in some of the taverns and bars in Minor Hill and that he reported this to Ms. Lipham. He said he saw the defendant at a bar, Sarah's Place, two or three times. He said the defendant was drinking beer and playing pool. He said the bar's manager told him the defendant was working there. He said he could not remember the dates he saw the defendant at the bar but that it was in 2004 before the defendant was served with the probation violation warrant.

Tina Workman testified that she was a bartender at Sarah's Place and that she had a conversation with Officer Sexton about the defendant being in the bar. She said she was a bartender there for six months but stopped working there in January 2004. She said the defendant stopped going to the bar sometime in December 2003. She said she served the defendant alcohol when he came into the bar.

¹The bar is referred to by witnesses as Sarah's Place and Sarah's Lounge. We will refer to the bar as Sarah's Place for consistency.

The defendant testified that he did not meet with his probation officer in November 2003 because he was in Centennial Hospital in Nashville. He said he was assigned a case worker while he was in the hospital for psychological treatment and thought his caseworker would contact his probation officer. He admitted he had a problem with alcohol and was on a waiting list to get inpatient treatment. He said he did not report for the January 2004 appointment with his probation officer because he was trying to get into a treatment center and did not return home until late that night. He admitted he did not call his probation officer. He said he had a job until January 2004, when the probation violation warrant was issued. He said he did not get another job after he lost that one but thought he would be able to work and pay his court costs. He said he now understood what he was required to do on probation and would not go to bars. He said that it had been several months since he had been to a bar and that he had stopped going to bars.

On cross-examination, the defendant said he was in Centennial Hospital for different periods of time. He said he was there for one week in October. He said he was in Centennial Hospital in November for four or five days. He acknowledged he did not call his probation officer to set up an appointment after he missed his meeting with her in November. He said that he missed reporting to his probation officer in December because he was working and that he called and left a message for her. He said he was making \$800 a month but lost his job in January 2004. He acknowledged he waited to turn himself in on the violation warrant until a bond was set. He acknowledged going to bars twice during his probation.

The trial court found that the defendant had violated his probation. It stated, "I'm going to fully revoke [the defendant's] probation in violation of [all four of] the grounds raised at the time this probation revocation warrant was signed."

At the hearing on the motion to rehear, Brenda Shelton testified that she was the defendant's ex-wife and that they were divorced in June 2004. She said that in October and November 2003, the defendant was in Centennial Hospital and asked someone at the hospital to call his probation officer each time. She said the defendant was living at a house she had for sale while he was on probation. She said that the house was located across the street from a bar and that she was aware that he had gone over to the bar to talk to people. She said the defendant's domestic assault conviction involved her mother. She said that while they were eating supper, the defendant and her mother were arguing and the defendant had been drinking. She said he took a pillow out of her mother's lap and a plate hit her mother on the side of the cheek.

On cross-examination, Ms. Shelton acknowledged that the other charges against the defendant arose after the defendant went to her house, took a gun from the bedroom, said he had nothing to live for, and said he would kill himself and Ms. Shelton. She acknowledged that he pulled the trigger or safety but that no shells were in the gun. She acknowledged the defendant shoved her toward the bed and began looking for shells. She said she yelled to her mother to call 9-1-1.

Linda Lipham, the defendant's probation officer, testified that she received one message stating the defendant was in Centennial Hospital and that it may have been someone from the hospital who left the message. She acknowledged that since the probation violation warrant was served, the defendant had followed the requirements of probation. Ms. Lipham said the defendant never called her to reschedule his missed reporting dates.

The trial court reserved judgment and allowed the defendant to file documentation of the defendant's hospitalizations. The defendant filed documentation showing (1) he was hospitalized during his November reporting dates from November 8 to 14, 2003, for major depression at Parthenon Pavilion; (2) he was working overtime during his December reporting dates; and (3) he was hospitalized during his February reporting dates at Parthenon Pavilion on February 11 and 12, 2004. The trial court entered an order on March 28, 2005, denying the defendant's amended motion for reduction of sentence and finding "[the defendant] violated the terms of his probation, both before and after the original warrant was issued."

The defendant contends that the trial court abused its discretion in revoking his probation. He contends the trial court erred in revoking his probation for alleged rule violations without considering alternative sentencing. He asserts he was denied his right to due process of law because the trial court did not rule on his motion to rehear and did not address the issue of prosecutorial bias. The state contends the defendant's notice of appeal was filed untimely. The state also argues that it was within the trial court's discretion to revoke the defendant's probation and that the trial court properly denied alternative sentencing. The state asserts the trial court ruled on all post-trial motions.

We first must address the state's assertion that the defendant's notice of appeal was untimely. The trial court entered the order revoking the defendant's probation on October 6, 2004. The defendant filed a motion to rehear on November 3, 2004, and an amended motion for reduction of sentence pursuant to Rule 35(b) of the Tennessee Rules of Criminal Procedure on November 5, 2004. The rehearing on the probation revocation was held on February 15, 2005. The trial court entered an order denying the Rule 35 motion on March 28, 2005. The defendant filed a notice of appeal on April 25, 2005. The defendant's notice of appeal filed April 25, 2005, was not filed within thirty days of the trial court's order revoking the defendant's probation, which was entered on October 6, 2004.

An appeal as of right is initiated by filing a notice of appeal within thirty days of the entry of the judgment being appealed. T.R.A.P. 3(e), 4(a). However, if a timely motion (1) for judgment of acquittal, (2) for new trial, (3) for arrest of judgment, or (4) for a suspended sentence is filed, the thirty days runs from the entry of the order determining such motion or motions. T.R.A.P. 4 (c). No other motion, including one for rehearing or for reduction of sentence, is allowed to suspend the running of the appeal time from the entry of the judgment. See State v. Lock, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992); State v. Bilbrey, 816 S.W.2d 71, 74-75 (Tenn. Crim. App. 1991). Therefore, neither the defendant's motion to rehear nor the defendant's Rule 35 motion suspended the running of the appeal time.

However, Rule 4(a) provides that the notice of appeal “is not jurisdictional and the filing of such document may be waived in the interest of justice.” T.R.A.P. 4(a). “In determining whether waiver is appropriate, this Court will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case.” State v. Markettus L. Broyld, No. M2005-00299-CCA-R3-CO, Davidson County, slip op. at 2 (Tenn. Crim. App. Dec. 27, 2005). The defendant stated the issues in his appeal clearly and has filed a complete record for our review. The defendant filed a motion to rehear and an amended motion for reduction of sentence within thirty days of the order revoking his probation. He then filed a notice of appeal within thirty days of the trial court’s order denying his amended motion for reduction of sentence. We believe the record reflects that the reason for the delay in filing the notice of appeal was the defendant’s attorney’s mistaken belief that the notice of appeal should not be filed until the trial court had ruled on the motions. In the interest of justice, we will waive the timely filing of the notice of appeal and address the defendant’s appeal on the merits.

I. PROBATION REVOCATION

The defendant contends that the trial court abused its discretion in revoking his probation. The defendant asserts that sufficient evidence was not presented that the defendant absconded, that he was only behind \$45 in probation fees, that he was not neglectful and did not willfully refuse to pay his court costs, and that there was not sufficient evidence to show he was frequenting Sarah’s Place after he made bail on the original revocation warrant.

The state contends the trial court was within its discretion to revoke the defendant’s probation. The state asserts the defendant did not report to his probation officer for three months and did not pay probation fees during those months. The state asserts that the defendant made no payment for court costs until after the probation violation warrant was filed and that the defendant admittedly went into bars knowing it was a violation of his probation.

The trial court stated in its order denying the defendant’s motion for reduction of sentence:

At the conclusion of the revocation hearing, this Court found that [the defendant’s] probation should be revoked based on testimony that: (1) At the time the probation violation warrant was issued, [the defendant] had not reported for the months of November and December of 2003, and January 2004; (2) He was behind on his payment of probation fees; (3) He had paid nothing towards his court costs; and (4) [the defendant] had been seen on numerous occasions in Sarah’s Place after making bail on the original revocation warrant.

[The defendant] now contends he was unable to make his probation appointment in November because he was hospitalized from November 8 to 11, 2004. He never called to reschedule his November appointment.

From all of which, the Court finds that the Motion for Reduction of Sentence should be, and same is hereby denied. [The defendant] violated the terms of his probation, both before and after the original warrant was issued.

A trial court may revoke probation upon finding by a preponderance of the evidence that the defendant has violated a condition of probation. T.C.A. §§ 40-35-310, -311(e).

A. Reporting Violations

A condition of the defendant's probation required him to report to his probation officer as instructed. The trial court found the defendant violated his probation for failing to report in November 2003, December 2003, and January 2004. The defendant admitted that he did not report at these times but provided reasons for not reporting. The record reflects the defendant was hospitalized from November 8 to 14, 2003. The defendant testified that he had a case worker at the hospital that he believed contacted his probation officer. He stated, "[T]hey assign you a case worker to take up the responsibilities of letting everybody, like at work, know and also the probation officer. So I thought at that time all that had been taken care of, that they had let her know where I was, you know, when I was in the hospital." Ms. Lipham acknowledged she received a message that the defendant was in the hospital. When asked if the message could have been from someone at the hospital, she responded, "Yes. I think so . . . I probably have it written in here but I probably have it written in the computer but I remember somebody saying he was in Centennial [Hospital]." She also testified that the defendant's ex-wife sent her a letter stating the defendant was in the hospital and that she verified the defendant was in the hospital. Although the defendant did not reschedule his November appointment, the record reflects that Ms. Lipham was informed the defendant was in the hospital.

The reasons provided by the defendant for failing to report in December 2003 and January 2004 did not justify the defendant's failure to contact his probation officer. The defendant failed to report to his probation officer in December 2003 because he was working overtime and failed to report in January 2004 because he went out of town to try to get into a treatment program. The defendant did not call his probation officer on either of these occasions and therefore violated his probation by failing to report in December 2003 and January 2004.

B. Probation Fees

A condition of the defendant's probation required him to pay all required fees to the Supervision and Criminal Injuries fund unless waived by the appropriate authorities. The record reflects the defendant paid his probation fees when he reported but missed paying fees for November 2003 through January 2004 when he did not report. Ms. Lipham stated that the defendant paid every time he reported to her and that he fell behind in paying fees when he did not report. According to the violation warrant, the defendant was only behind \$45 in probation fees. She stated that the

defendant caught up on his fees once he started reporting again. In failing to pay his probation fees in November 2003, December 2003, and January 2004, the defendant violated his probation.

C. Court Costs

A special condition of the defendant's probation required the defendant to "pay costs." The probation order does not state that a certain amount had to be paid each month. The defendant did not pay any court costs from the time the probation order was entered July 16, 2003, until the probation violation warrant was filed January 30, 2004. Ms. Lipham testified that she did not put the defendant on a monthly payment schedule for court costs. She acknowledged that she told the defendant to pay as much as he could each month and that he had to pay the \$1015 in court costs before his probation ended. Ms. Lipham acknowledged she did not know what, if anything, the defendant was able to pay toward his court costs from July 2003 to January 2004. The defendant said, "I was under the assumption that I had until I was off probation to get the court costs and everything paid." The defendant made a payment of \$100 in April 2004. We conclude the record does not support a finding that the defendant violated his probation in failing to make any payments toward his court costs from July 2003 to January 2004.

D. Entering an Establishment That Serves Alcohol

A condition of the defendant's probation prohibited him from entering "an establishment whose prime purpose is to sell alcoholic beverages (bars, taverns, clubs, etc.)." The amended probation violation warrant stated that "subject was observed by Minor Hill Police working and/or frequenting Sarah's Place, a bar in Minor Hill." Officer Sexton testified he saw the defendant in Sarah's Place two or three times in 2004 before the defendant was served with the probation violation warrant. Ms. Workman testified that the defendant had been to Sarah's Place more than once and that she served him beer. She said the defendant stopped going to Sarah's Place sometime in December 2003. The defendant acknowledged that he went into a bar twice while he was on probation. The defendant asserts there was not sufficient evidence to support the trial court's finding that he frequented Sarah's Place after he made bail on the original revocation warrant. We agree with the defendant that the record does not show he was frequenting Sarah's Place after he made bail on the revocation warrant. However, the record shows the defendant frequented Sarah's Place before he made bail on the revocation warrant and while he was on probation. Therefore, the defendant violated his probation.

The record supports the trial court's findings that the defendant violated his probation for failing to report to his probation officer, failing to pay probation fees, and for frequenting an establishment whose prime purpose was to sell alcohol. We conclude that the trial court did not abuse its discretion in revoking the defendant's probation, and the defendant is not entitled to relief on this issue.

II. ALTERNATIVE SENTENCING

The defendant contends that the trial court erred in failing to consider alternative sentencing when it revoked his probation. He contends the trial court should have considered giving him a second chance on probation because the evidence preponderates against ordering the defendant to serve his sentence in confinement. He contends the trial court did not consider the sentencing principles and relevant facts in fully revoking the defendant's probation. The state asserts the defendant was originally given an alternative sentence of probation but failed to comply with the probation terms until he was faced with revocation. The state asserts it is not an abuse of discretion for the trial court not to let the defendant "fool him twice." The state asserts the defendant was given his chance at alternative sentencing when he was placed on probation after his guilty plea, and he failed to take advantage of the opportunity.

If the trial court revokes probation, it can "(1) order incarceration; (2) cause execution of the judgment as it was originally entered; or (3) extend the remaining probationary period for a period not to exceed two years." State v. Hunter, 1 S.W.3d 643, 648 (Tenn. 1999). The decision to revoke probation is within the sound discretion of the trial court, and its judgment will be reversed only upon a showing of an abuse of discretion, reflected in the record by an absence of substantial evidence to support the trial court's decision. State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997).

The trial court originally ordered the defendant to serve his sentences on probation. Before revoking the defendant's probation and ordering him to serve his sentences, the trial court was presented with evidence that the defendant violated the conditions of his probation. The defendant admitted failing to report to his probation officer and admitted frequenting bars. The trial court denied any additional alternative sentencing options and ordered the defendant to serve his sentences. We conclude the trial court did not abuse its discretion in ordering the defendant to serve his sentences in confinement.

III. MOTION TO REHEAR

The defendant asserts he was denied due process because the trial court did not rule on his motion to rehear and did not address the issue of prosecutorial bias. He asserts the trial court did not make a written statement as to the evidence used to deny the defendant's motion to rehear as required by Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S. Ct. 1756, 1762 (1973). The state asserts the trial court ruled on the motion to rehear and held a rehearing on February 15, 2005. The state asserts the trial court addressed the motion to rehear in the second part of its order in which it found that sufficient grounds existed to revoke the defendant's probation. The state also asserts that the defendant did not raise the issue of prosecutorial bias until after the revocation and that the defendant waived this issue by failing to object.

"Where factual issues are involved in determining a motion, the court shall state its essential findings on the record." Tenn. R. Crim. P. 12(e). If a trial court revokes a defendant's probation, due process requires that the trial court make a written statement as to the evidence it relied on and the reasons for revoking probation. State v. Leiderman, 86 S.W.3d 584, 590 (Tenn. Crim. App.

2002) (citing Gagnon, 411 U.S. at 786, 93 S. Ct. at 1762). This due process requirement can be satisfied by oral findings that are recorded or transcribed. Id.

On February 15, 2005, the trial court conducted a hearing on the defendant's motions to rehear and for reduction of sentence. On March 28, 2005, the trial court entered a written order regarding the hearing conducted on February 15, 2005. Although the trial court's order states the cause was heard on "Defendant's Amended Motion for Reduction of Sentence," the trial court addressed the motion to rehear. In the defendant's motion to rehear, the defendant raised two issues: (1) "that circumstances of his case did not merit full revocation and imposition of his sentence" and (2) the prosecutor "had a personal bias against this Defendant and should have recused herself." The trial court's order included the reasons and the evidence it considered in revoking the defendant's probation. However, the trial court's order did not address the issue of prosecutorial bias.

At the hearing, the defendant's attorney presented his own affidavit for the trial court's consideration on the issue of prosecutorial bias. The state objected to the affidavit but the trial court accepted the affidavit as an offer of proof. The affidavit stated

On at least one occasion I discussed this case with Assistant District Attorney Patrick Butler prior to Assistant District Attorney Beverly White arriving in Court and it was agreed that [the defendant] would be revoked and allowed to attend Alcohol and Drug Treatment and then reinstated. Assistant District Attorney Butler indicated he had authority to make this settlement even though I told him Assistant District Attorney White considered this her case.

After Assistant District Attorney White arrived and spoke with Mr. Butler he came back and advised that he could not go through with the settlement and I would have to negotiate with Assistant District Attorney White.

In response to the defendant's assertions, General White argued

I spoke with General Butler, after this motion to rehear came in, and as an officer of the court I'm telling you I asked him if he had reached any kind of an agreement or made an offer with [the defendant's attorney] and he stated, no, he didn't. When he knew it was a domestic assault case and a domestic case he sent it to me.

The record of the probation hearing is devoid of any objection made by the defendant's attorney to General White's prosecuting this case. The defendant's attorney first raised this issue in his motion to rehear, which he filed after the probation hearing had ended and the trial court had revoked the defendant's probation. The defendant's attorney acknowledged at the rehearing that he failed to object. He stated

I didn't make that motion[.] I did not ask General White to recuse herself from the case, I felt that if we did have to have a hearing that the Court would see fit to do something less than a full revocation. And that's what the Court ordered was a full revocation. I basically - - I made the statement to my client, we discussed the fact that General White seemed to have a personal attitude.

. . . .

I discussed that with my client and I made the statement to them that that's what the Court's for and the Court could, you know, separate that out and see what justice dictated in the case.

Failure to object at trial constitutes waiver of the issue. T.R.A.P. 36(a). Rule 36(a) shall not be construed as "requiring relief to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error." Id. Because the defendant failed to object, this issue is waived.

CONCLUSION

Based on the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, JUDGE